

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	
)	
Assessment and Collection of Regulatory Fees)	MD Docket No. 04-73
for Fiscal Year 2004)	

COMMENTS OF THE WIRELESS CARRIERS

The undersigned wireless carriers, which include American Cellular Corporation, AT&T Wireless Services, Inc., Dobson Cellular Systems, Inc., Nextel Communications, Inc., Sprint Corporation, T-Mobile USA, Inc., and Western Wireless Corporation, submit these comments in support of the petition for reconsideration filed by Cingular Wireless in response to the *Fiscal Year 2004 Regulatory Fee Order* (“*Order*”).¹ Because the new NRUF methodology imposes new costs on carriers (and the Commission) while resulting in less accurate regulatory fee computations than the past practice of using actual subscriber count data, the undersigned urge the Commission to confirm on reconsideration that wireless carriers may continue to utilize year-end active customers in service data in determining the total amount of regulatory fees owed by each carrier.

¹ See *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Docket No. 04-73, *Report and Order*, FCC 04-146, 19 FCC Rcd 11662 (June 24, 2004), *published* in 69 Fed. Reg. 41027 (July 7, 2004)(“*Order*”). See also Public Notice, *Petitions for Reconsideration of Act in Rulemaking Proceeding*, Report No. 2671 (Sept. 2, 2004), *published* in 69 Fed. Reg. 54787 (Sept. 10, 2004).

I. USE OF SUBSCRIBER DATA WOULD RESULT IN SUBMISSION OF MORE ACCURATE REGULATORY FEES AT FAR LESS COST COMPARED TO THE NEW NRUF METHODOLOGY

There are many ways that regulatory fees can be assessed on a given industry segment. For example, in the schedule adopted as part of the Regulatory Fee Act,² Congress specified that cellular and PCS licensees should pay fees using a “per 1,000 subscriber” methodology.³ FCC Rule 1.1152 specifies that wireless carrier fees should be based on a “per unit” methodology.⁴ Historically, most wireless carriers have used a count of year-end active subscribers because this methodology provides accurate data at minimal cost (as subscriber information can be readily obtained from billing systems). In the *Order*, however, the Commission announced that it would begin using “NRUF ‘assigned’ telephone number counts” in order to compile “an estimated subscriber count of active, assigned telephone numbers” – except for small carriers that may continue to use their subscriber count.⁵

There are several fundamental problems with the new NRUF methodology. First, the methodology does not result in the development of accurate data, as the Commission acknowledges in the *Order*. Second, the new methodology entails more work (and, therefore, cost) for both carriers and the Commission. Finally, the new methodology has the potential to create need-

² See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 2002(a), 107 Stat. 297 (1993), which added Section 9 to the Communications Act, *codified at* 47 U.S.C. § 159 (“Regulatory Fee Act”).

³ See 47 U.S.C. § 159(g). Congress used the same “per 1,000 subscriber” methodology for “competitive access providers,” but used a slightly different methodology – “per 1,000 access lines” – for “local exchange carriers.” *Id.*

⁴ 47 C.F.R. § 1.1152. See also *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Docket No. 04-73, *Notice of Proposed Rulemaking*, FCC 04-73, 19 FCC Rcd 5795, at ¶ 27 (2004)(CMRS “fees based upon a subscriber, unit or circuit count.”).

⁵ *Order* at ¶¶ 45, 47 and 49. It is unclear from the *Order* whether the FCC is effectively modifying Rule 1.1152 to replace “per unit” with a “per assigned telephone number,” or whether it is simply utilizing NRUF data to prepare its bills and that carriers may continue to base their fees on subscriber counts. Clarification of this issue would be helpful if the FCC does not grant the requested reconsideration.

less confusion in the investor community. The undersigned wireless carriers therefore urge the Commission on reconsideration to confirm that wireless carriers may continue to use actual subscriber count data in computing their “per unit” regulatory fees.

A. THE ORDER ACKNOWLEDGES THAT THE NEW NRUF METHODOLOGY DOES NOT PROVIDE DATA THAT ACCURATELY REFLECTS SUBSCRIBER UNITS

The Commission has acknowledged that it is “extremely important for us to receive complete and accurate information directly from industry sources”.⁶

We must be able to determine, or estimate with some degree of precision, the number of feeable units that are within each fee payment category and be able to determine the pro rata share of our regulatory costs that must be assessed per feeable unit.⁷

Indeed, in implementing the Data Quality Act, the Commission reaffirmed its “dedicat[ion] to ensure that all data it disseminates reflect a level of quality commensurate with the nature of the information.”⁸

The subscriber count methodology that carriers have historically used ensures data integrity and accuracy. As discussed in Part II below, the Commission uses this same data in developing its local competition reports. In stark contrast, the new NRUF methodology will not result in data that accurately reflects subscriber units.

Cingular pointed out in its NPRM comments that NRUF assigned number counts do not accurately reflect the number of subscribers because of the way that ported and pooled numbers are treated in the number reporting rules. The Commission acknowledged that Cingular’s con-

⁶ *Annual Assessment of the Status of Competition in the Video Programming Market*, 19 FCC Rcd 10909 at ¶ 6 (June 17, 2004). See also *Bell Atlantic/NYNEX Merger Performance Reports*, 14 FCC Rcd 7485, 7485 ¶ 2 (1999)(“[W]e recognize the critical importance of filing accurate data.”); *1998 Biennial Regulatory Review*, 13 FCC Rcd 12266, 12268 ¶ 6 (1998)(“[I]t is vital that the Commission have accurate and timely information.”).

⁷ *Fiscal Year 1999 Notice of Inquiry*, 14 FCC Rcd 1113, 1117 ¶ 9 (1998).

⁸ *Data Quality Act Implementation Order*, 17 FCC Rcd 19890, 19891 ¶ 5 (2002).

cerns are “valid.”⁹ To address the ported number issue, the Commission stated that it would map NRUF report data against the LNP databases to compile an “estimated” subscriber count of active assigned numbers net of ported numbers.¹⁰ In response to the pooled number issue, the Commission stated only: “At this time, we are unable to address this issue.”¹¹

It would be understandable if the Commission utilized an NRUF methodology because there was no other way to obtain more accurate subscriber count data. But in this instance, there is an alternative methodology that produces more accurate results: actual subscriber count data retrieved from carrier billing systems. The undersigned wireless carriers submit that no regulatory purpose is served by replacing a highly accurate methodology with one that the Commission acknowledges will be based on estimated subscriber units only.

B. THE NEW NRUF METHODOLOGY NEEDLESSLY IMPOSES NEW COSTS ON CARRIERS AND THE COMMISSION ALIKE

Obtaining accurate data is important, as discussed above. But equally important is minimizing the cost of fee collection on carriers. As the Commission stated in implementing the Regulatory Fee Act, “wherever possible,” it should “ease the burden on those entities subject to the payment of these fees.”¹² The Commission specifically stated that its regulatory fee program should utilize “the most effective means possible” and that the financial burden resulting from the collection process be kept “to an absolute minimum.”¹³ Even in the *Order*, the Commission reaffirmed its “commitment to reviewing, streamlining and modernizing our statutorily required fee-

⁹ See *Order* at ¶ 46.

¹⁰ See *id.*

¹¹ *Id.*

¹² *Implementation of Section 9 of the Communications Act*, 59 Fed. Reg. 30984 ¶ 2 (June 16, 1994).

¹³ *Id.*

assessment and collection procedures.”¹⁴ The undersigned submit that the new NRUF methodology needlessly imposes new costs on both carriers and the Commission alike.

Consider the new work involved in the NRUF methodology – none of which was necessary when carriers utilized their actual subscriber count data:

- ◆ Under the new methodology, FCC staff will be required to scrub NRUF report data against data in the LNP databases in order to develop an “estimate” of the number of active customers.¹⁵ (And, as the FCC recognized, there is no means to address the problem of contaminated numbers in pooled number blocks.)
- ◆ Because the first assessment letter will be based on estimates only, the FCC has been compelled to establish a new reconciliation process so a carrier may “correct our estimate of the aggregate total directly on the letter and state a reason for the discrepancy.”¹⁶ But there are two problems with this new true-up process: (1) carriers have very little time to conduct an audit (17 days in 2004); and (2) carriers must effectively engage in a number-by-number analysis to identify discrepancies between the FCC’s initial estimate and the carrier’s own subscriber count records, and then “provide a reason for the change” and identify the carrier that has “acquired these subscribers.”¹⁷
- ◆ If a carrier challenges the FCC’s estimate, FCC staff will then have to devote resources in reviewing the challenge.
- ◆ If FCC staff denies the carrier challenge even in part, staff will be required to prepare a written statement identifying the reasons for denying the challenge.¹⁸

The undersigned wireless carriers submit that there are major issues of due process when an administrative agency uses an admittedly inaccurate methodology, imposes on carriers the

¹⁴ *Order* at ¶ 60.

¹⁵ *See Order* at ¶ 47.

¹⁶ *Order* at ¶ 48.

¹⁷ *Id.*

¹⁸ *See, e.g.,* 5 U.S.C. § 555(e). The undersigned wireless carriers assume that the FCC did not intend to repeal Rules 1.1160 (refunds) and 1.1167 (error claims) by its statement: “Carriers will not have an opportunity to correct the aggregated subscriber count on the second assessment letter.” *Order* at ¶ 48. Obviously, there would be major issues of due process if carriers were precluded from challenging FCC staff decisions.

burden of correcting the estimates that the agency generates, and then gives carriers only 17 days to review millions of records in order to meet their burden of proof. As importantly, however, the work described above with the new methodology is completely unnecessary. None of the work described above would be necessary if the Commission permitted carriers to continue the *status quo* by basing their regulatory fees on actual subscriber counts.

If the Commission's goal with its fee program is to use "the most effective means possible" and to keep financial burden "to an absolute minimum," then the new NRUF methodology fails miserably when compared to the historic practice of using actual subscriber count data.

**C. THE NEW NRUF METHODOLOGY HAS THE POTENTIAL TO CAUSE NEEDLESS
CONFUSION TO INVESTORS AND THE FINANCIAL COMMUNITY**

The undersigned wireless carriers are also concerned that the new NRUF methodology will cause needless confusion among investors and the financial community. Carriers may report subscriber data in their financial reports, and investors use this information in making their investment decisions. Most persons, when being told that a carrier has specified number of "assigned telephone numbers," will assume that this number equates to the total number of active customers. (The public will not appreciate that under the FCC's number reporting rules, carriers are considered to have numbers "assigned" to them even when the person using the telephone number is served by another carrier.) The undersigned fear that investors will be confused if they learn that a carrier's subscriber count and its assigned number count are different. No purpose would be served by attempting to educate investors on the intricacies of the Commission's number reporting rules, which were designed to forecast number exhaust, not count the number of active customers.

II. THERE ARE BETTER WAYS TO ADDRESS ANY CONCERNS THE COMMISSION MAY HAVE WITH HISTORIC PRACTICE

The undersigned wireless carriers assume the Commission changed historic practices because it perceived a defect with this practice. The problem the carriers face is that the Commission changed its fee collection practices without identifying any defect with the practice being replaced.

It is possible the Commission did not like the historic practice because Staff involved in the fee program did not know before fee payment how many subscribers each carrier had at the end of the previous year (thus hampering Staff's ability to propose a per unit fee). If this was a Commission concern, estimates of carrier subscriber numbers can be made by taking advantage of the subscribership data that many wireless carriers submit biannually in their Form 477s.¹⁹

It may be that the Commission had a different concern with historic practices. The point is that if the Commission has concerns about an actual subscriber count methodology, notwithstanding its extremely low implementation costs and its high degree of accuracy, then the Commission should share these concerns with industry. The undersigned wireless carriers are confident that in working together, the Commission and industry can find a cost-effective solution that meets the needs of all involved.

III. CONCLUSION

The undersigned believe that when there are two ways to achieve the same objective, the Commission should choose the approach that imposes fewer costs on carriers and that achieves a

¹⁹ Currently, carriers that do not serve more than 10,000 customers in a state need not complete a Form 477 for that state, although the FCC is currently considering lowering this threshold. *See Data Collection NPRM*, WC Docket No. 04-141, FCC 04-81, 19 FCC Rcd 7364, ¶ 11 (2004). However, even with the "10,000-subscribers-per-state" threshold, the overwhelming majority of wireless customers are included in current Forms 477. *Compare Data Collection Order*, 15 FCC Rcd 7717, 7740 n.128 (2000)(10,000 access line threshold still results in reports that include "over 98% of incumbent LEC lines").

higher degree of accuracy. The undersigned wireless carriers therefore respectfully request that the Commission reconsider and/or clarify its *Order* by confirming that wireless carriers may continue to report and use year-end customers in service data in determining the total amount of regulatory fees owed by each carrier.

Respectfully submitted,

American Cellular Corporation
AT&T Wireless Services, Inc.
Dobson Cellular Systems, Inc.
Nextel Communications, Inc.
Sprint Corporation
T-Mobile USA, Inc.
Western Wireless Corporation

/s/

Douglas I. Brandon
Vice President
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036
(202) 223-9222

/s/

Ronald L. Ripley
Vice President and Corporate Counsel
Dobson Cellular Systems, Inc.
14201 Wireless Way
Oklahoma City, OK 73134-2512
(405) 529-8376

/s/

Robert H. McNamara
Senior Counsel – Regulatory
Nextel Communications, Inc.
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4000

/s/

Luisa L. Lancetti
Vice President, Wireless Regulatory Affairs
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington D.C. 20004
(202) 585-1923

/s/

Jeffrey M. Pfaff
Sprint Corporation
6450 Sprint Parkway
Mailstop: KSOPHN0212
Overland Park, KS 66251
(913) 315-9294

/s/

Thomas Sugrue, Vice President
Government Affairs
Anna Miller, Director
Numbering Policy
T-Mobile USA, Inc.
401 9th Street, N.W. – Suite 550
Washington, D.C. 20004
(202) 654-5900

/s/
William J. Hackett
Director, Regulatory Compliance
Western Wireless Corporation
401 9th Street, N.W. – Suite 550
Washington, D.C. 20004
(202) 654-5980

/s/
Ronald L. Ripley
Vice President and Corporate Counsel
American Cellular Corporation
14201 Wireless Way
Oklahoma City, OK 73134-2512
(405) 529-8376

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